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Lee Kong Meng v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–47 OF 2008
ZALEHA ZAHARI, SULAIMAN DAUD AND BALIA YUSOF JJCA
4 OCTOBER 2011

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in bag placed by appellant in boot of taxi — Whether trial judge erred in finding that appellant had knowledge of contents of bag — Whether trial judge was right to invoke statutory presumption of trafficking — Whether trial judge erred in his finding that appellant failed to raise reasonable doubt — Dangerous Drugs Act 1952 ss 37(da) & 39B(1)

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Acting on information received of drug trafficking activities by usage of a taxi at a certain condominium complex ('the complex'), a police party headed by an ASP had conducted an observation of the complex. During that surveillance the ASP had stopped the taxi in which the appellant and another ('the first accused') were travelling in, while the said taxi was making its way out of the complex. The taxi driver and his two passengers, the two accused, were then instructed to get out of the taxi while the police searched the taxi. In the course of this search, the police recovered a black plastic bag ('the bag') which contained six compressed slabs of material, which were later confirmed by the chemist to be 5,425g of cannabis, from the boot of the taxi. The appellant and the first accused were arrested and charged with trafficking in the cannabis found in the bag. The taxi driver testified that after he had picked up the first accused he had picked up the appellant, who had asked to be taken to the complex. As the taxi driver was unfamiliar with the area he had missed the entrance to the car park of the complex. When the taxi driver had refused to reverse to enter the car park, the appellant had allegedly got out of the taxi and returned ten minutes later with the black plastic bag, which he had stored in the boot of the taxi. According to the taxi driver, during the time the appellant left the taxi to collect the bag, the first accused and the taxi driver had remained seated in the taxi. At the end of the prosecution's case the trial judge found that there was neither any evidence that the first accused had custody and control of the black bag containing the drugs nor any evidence of a common intention between the first accused and the appellant to traffic in the dangerous drugs. As such, the first accused was acquitted and discharged at the close of the prosecution's case. However, based on the evidence the trial judge was of the view that the appellant had exclusive care and control of the bag containing the cannabis and that the prosecution had proved a prima facie case against the appellant. The appellant's defence was that the bag he was carrying did not belong to him but to one Ah Foo and that he did not know the contents of the

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bag. After a careful consideration of this defence the trial judge concluded that the defence had failed to raise a reasonable doubt against the prosecution case. The trial judge then convicted the appellant of trafficking and sentenced him to death. This was the appellant's appeal against that decision.

Held, dismissing the appeal:

(1) Based on the evidence of the movements and conduct of the appellant as well as by reason of the large quantity of drugs recovered, the trial judge was right to draw the inference that the appellant had knowledge of the contents of the bag that he himself had placed in the boot of the taxi. After concluding that the appellant had knowledge of the contents of the bag, the trial judge was right to have invoked the statutory presumption under s 37(da) of the Act (see para 22).

(2) The trial judge was right in not accepting the defence story and in ruling that the appellant had failed to raise a reasonable doubt in his favour. The presence of Ah Foo was clearly an afterthought and improbable as it was not raised at the first possible instance and not put in cross-examination to the prosecution witnesses (see para 23).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima mengenai aktiviti pengedaran dadah dengan menggunakan teksi di kompleks kondominium tertentu ('kompleks'), pihak polis yang diketuai oleh ASP telah melakukan pemerhatian ke atas kompleks tersebut. Semasa pengawasan tersebut ASP telah memberhentikan teksi yang mana perayu dan seorang lagi ('tertuduh pertama') berada di dalamnya, semasa teksi tersebut bergerak keluar daripada kompleks tersebut. Pemandu teksi dan kedua-dua penumpangnya, kedua-dua tertuduh, kemudiannya diarahkan keluar daripada teksi tersebut semasa polis mengeledah teksi tersebut. Semasa penggeledahan tersebut, polis menemui beg plastik hitam ('beg') yang mengandungi enam papak mampat material, yang kemudiannya disahkan oleh ahli kimia sebagai kanabis seberat 5,425g, daripada but teksi. Perayu dan tertuduh pertama ditangkap dan didakwa dengan mengedar dadah kanabis yang dijumpai di dalam beg tersebut. Pemandu teksi memberi keterangan bahawa selepas dia mengambil tertuduh pertama dia mengambil perayu, yang meminta dihantar ke kompleks tersebut. Memandangkan pemandu teksi tersebut tidak biasa dengan kawasan tersebut dia terlepas jalan masuk ke kawasan letak kereta kompleks tersebut. Apabila pemandu teksi enggan mengundur untuk memasuki tempat letak kereta, perayu didakwa keluar daripada teksi tersebut dan kembali sepuluh minit kemudian dengan beg plastik hitam, yang dia letakkan di but teksi tersebut. Mengikut pemandu teksi, semasa perayu meninggalkan teksi untuk mengambil beg tersebut, tertuduh pertama dan pemandu teksi kekal duduk di dalam teksi tersebut. Pada akhir kes pendakwaan, hakim perbicaraan mendapati bahawa tidak terdapat apa-apa keterangan bahawa tertuduh

pertama mempunyai kawalan dan jagaan beg hitam yang mengandungi dadah tersebut dan juga apa-apa keterangan mengenai niat bersama di antara tertuduh pertama dan perayu untuk mengedar dadah berbahaya tersebut. Oleh itu, tertuduh pertama dilepas dan dibebaskan pada akhir kes pendakwaan. Walau bagaimanapun, berdasarkan keterangan hakim perbicaraan berpendapat bahawa perayu mempunyai jagaan dan kawalan eksklusif beg yang mengandungi kanabis tersebut dan pendakwaan telah membuktikan kes *prima facie* terhadap perayu. Pembelaan perayu adalah beg yang dibawanya bukan miliknya tetapi seorang yang bernama Ah Foo dan dia tidak mengetahui kandungan beg tersebut. Selepas pertimbangan teliti pembelaan ini hakim perbicaraan memutuskan bahawa pembelaan telah gagal untuk membangkitkan kesangsian munasabah terhadap kes pendakwaan. Hakim perbicaraan kemudiannya mensabitkan perayu dengan pengedaran dan menghukum dia sampai mati. Ini adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan:

(1) Berdasarkan keterangan pergerakan dan kelakuan perayu dan juga atas alasan kuantiti besar dadah yang ditemui, hakim perbicaraan adalah betul untuk membuat inferens bahawa perayu mempunyai pengetahuan mengenai kandungan beg tersebut bahawa dia sendiri yang meletakkannya di dalam *boot* teksi. Selepas memutuskan bahawa perayu mempunyai pengetahuan kandungan beg tersebut, hakim perbicaraan adalah betul dalam membangkitkan anggapan statutori di bawah s 37(da) Akta Dadah Berbahaya 1952 (lihat perenggan 22).

(2) Hakim perbicaraan adalah betul dalam tidak menerima cerita pembelaan dan dalam memerintah bahawa perayu telah gagal untuk membangkitkan kesangsian munasabah untuk memihaknya. Kehadiran Ah Foo adalah jelas satu yang difikirkan kemudian dan sukar diterima akal kerana ia tidak dibangkitkan pada mulanya dan tidak diperiksa balas sebagai saksi pendakwaan (lihat perenggan 23).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)
Penal Code s 34

Appeal from: Criminal Trial No 45–47 of 2005 (High Court, Kuala Lumpur)

Ameenuddin Ibrahim (Amen Harbhajan & Co) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zaleha Zahari JCA:

[1] Lee Kong Meng ('the second accused in the High Court/appellant in this appeal') was charged together with Wai Hap Kuen ('the first accused') under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s 34 of the Penal Code with trafficking in dangerous drugs, ie 5425g cannabis. The first accused was acquitted and discharged at the end of the prosecution's case. The trial judge however held that the prosecution had proved a prima facie case against the second accused and called upon the second accused to enter his defence. On 13 March 2008, the High Court judge's found the second accused guilty as charged, convicted him, and then imposed the mandatory sentence of death upon him. Hence this appeal.

[2] We dismissed the second accused appeal against conviction and sentences for the following reasons.

THE HIGH COURT JUDGE'S DECISION

[3] The High Court judge's appraisal of the evidence adduced by the prosecution, his findings and decision are as follows.

[4] On 18 August 2003 ASP Tan Boon Hooi ('SP2') received information of drug trafficking activities by usage of a taxi at Danau Indah Condominium. At about 3am SP2, together with five other officers, went to Danau Indah Condominium to carry out surveillance and observation. At about 4.50am, SP2 saw a taxi, registration No HWA 8844, entering the condominium complex. About ten minutes later the said taxi proceeded to make its way out of the complex. SP2 stopped the taxi near the security post and identified himself as a police officer. The three persons in the taxi were instructed to get out of the taxi. The driver of the taxi was identified as Lee Fok Keong ('SP6'), the passenger seated in the front seat was Wai Hap Kuen (the first accused), whilst the passenger seated in the rear seat was Lee Kong Meng (the second accused).

[5] The result of a search of the taxi carried out by SP2 was the recovery of black plastic bag (exh P31) containing a box (exh 32) which in turn contained six compressed blocks wrapped in aluminium (exh P24 A-C) from the boot of the taxi suspected to be cannabis. All three persons in the taxi, together with the exhibits recovered, were then brought to IPK Narkotik Kuala Lumpur then subsequently handed to the investigating officer, Chief Inspector Yap Huat Tian ('SP8').

[6] The taxi driver, Lee Fook Keong (SP6), testified that on 18 August 2003, the first accused was a passenger in his taxi from Cheras to a coffee shop at Pandan Indah. At a bus stop in front of the coffee shop he stopped. The second accused then entered the taxi and sat at the rear passenger seat. The second accused asked SP6 to go to Taman Desa. As SP6 was unfamiliar with the area, the second accused gave SP6 directions how to get there. When they arrived at Taman Desa, the second accused asked SP6 to enter the condominium complex. SP6 did so. SP6 missed the entrance to the car park of the condominium which was on the upper level. SP6 refused to reverse in order to enter the upper level of the car park when the second accused asked him to do so.

[7] The second accused then went out of the taxi and told SP6 to wait for him as he wanted to pick up something. The first accused remained in the taxi. About 10 minutes later the second accused returned, asked SP6 to open the boot of the taxi, which SP6 did by pulling a lever in the taxi. SP6 saw the second accused putting a black plastic bag in the boot of the taxi. The second accused then re-entered the taxi and asked SP6 to exit out of the condominium complex. On their way out they were all detained.

[8] Based on these evidence, at the end of the prosecution's case, in respect of the first accused, the High Court judge's finding was that, there was no evidence to show that the black plastic bag containing the incriminating drugs was under the custody and control of the first accused. Nor was there any evidence of a pre-arranged plan between the first and second accused to traffic in dangerous drugs. There was no evidence of a common intention between the first accused with the second appellants to do so. The learned judge then acquitted and discharged the first accused. There is no appeal lodged by the public prosecutor against this decision of the learned trial judge.

[9] In respect of the charge against the second accused, the High Court judge's finding was that, based on SP6's evidence, that the second accused was the person who brought the plastic bag containing the incriminating drugs and placing it in the boot of the taxi, the judge made a finding of fact that the black plastic bag was under the exclusive care and control of the second accused. In arriving at this decision, the judge took into consideration the fact that both the first accused and SP6 did not get out of the taxi, and these two persons had not handled the said black plastic bag containing the incriminating drugs placed in the boot of the taxi.

[10] On the issue of whether the second accused had knowledge of the dangerous drugs contained in the black plastic bag which he had placed in the boot of the taxi, the learned judge's finding was that, based on the second accused action and conduct, it could be inferred that the second accused had

knowledge and that he knew the contents of the said plastic bag. He took into consideration the fact that it was the second accused who gave directions to SP6 how to get to the condominium at Taman Desa after picking him up at Pandan Indah. The fact that it was the second accused who directed SP6 to pass the security guard and the person who told SP6 where to stop, then in instructing SP6 to wait for him, then later returning with the plastic bag containing the incriminating drugs and placing it in the boot of the taxi. The judge also took into consideration the fact that the quantity of drugs recovered was huge.

[11] The judge then invoked the statutory presumption under s 37(da) of the Act. The burden then lies on the second accused to rebut the said presumption on a balance of probability. The judge then held that the prosecution had proved a prima facie case against the second accused and called upon him to enter his defence.

[12] In our view the judge was correct in his assessment of the evidence and in acquitting the first appellant and in calling for the second appellant defence.

THE DEFENCE OF THE SECOND ACCUSED

[13] The second accused testified that on the night in question he received a call from a friend 'Ah Foo' asking him to meet him at a condominium at Taman Desa to collect something, to then keep it in his house, and that he (Ah Foo) would subsequently collect it from there. As he did have enough money to go there by taxi he called a friend 'Ah Ken' (the first accused) to pick him up and that he would wait for the first accused at Restoran 2628 which was in front of the flat where he was.

[14] The first accused arrived in a taxi as arranged. He then entered the taxi and sat on the rear passenger seat. He then asked the taxi driver to proceed to Taman Desa and gave the taxi driver directions how to get there. Upon arrival at the condominium the second accused saw Ah Foo and asked the taxi driver to stop. The taxi driver had however overshot the point of entry to the car park on the upper level. The second accused asked the taxi driver to reverse but the taxi driver refused to do so as it was then dark.

[15] He then went out of the taxi and approached Ah Foo. Ah Foo handed him a black plastic bag. He did not see or ask Ah Foo what was in the said plastic bag. He then placed the black plastic bag which Ah Foo had given him in the boot of the taxi. He then re-entered the taxi and asked the taxi driver to exit. On the way out at the security check point they were then arrested

[16] The second accused testified that he was assaulted for about 10 minutes,

A subjected to a body search, then pulled up and pushed towards the back of the taxi where a package was shown to him. A Chinese police officer administered a caution. The police asked him, to whom the package belonged? The appellant kept silent. He was then again assaulted. The second accused stated that he did not reply because of the caution administered, that anything he said would be B used as evidence.

[17] He was then brought to the car park by the taxi, to the place where he had earlier met Ah Foo. A Honda Civic was parked there. He was asked, to whom did the Honda Civic belonged? He replied that he did not know. When C asked whether the car belonged to Ah Foo, he remained silent. He was then brought to the police station. The black plastic bag belonged to his friend Ah Foo and that he did not know its contents.

D **[18]** Prior to this incident Ah Foo had asked his assistance to bring clothes for the women employees who worked at a spa. He often went to the condominium to pick up the clothes when asked by Ah Foo to do so. He knew they were clothings as Ah Foo told him so but he did not actually see them. Usually he would pick up the clothes from Ah Foo at odd times, sometimes E early morning, 1am, 5am, 3am to be sent to the spa where the women worked, sometimes to bring it back to his house to be collected by Ah Foo. Ah Foo would not pick them up personally but would ask his friend to pick it up.

F **[19]** When he met Ah Foo that night, Ah Foo asked him to bring the plastic bag to his house, to place it outside his house on the shoe rack. He did not question Ah Foo as he was in a hurry.

[20] The learned judge's appraisal of the defence was that it was G contradictory, inconsistent and unlikely. He was of the view that a mere denial was insufficient to rebut the presumption of trafficking on a balance of probabilities. The judge did not also believe the defence story by reason of the defence counsel not raising the existence of Ah Foo, nor the Honda car, in cross examination of SP2, as well as of SP8 ('IO'). He then found the second accused H guilty and imposed the sentence of death upon him.

DECISION

[21] The evidence adduced shows that the fact that the second accused had I custody and control of the plastic bag containing the incriminating drugs was not challenged. The only issue raised is whether the second accused had knowledge of the contents of the plastic bag which he was seen holding and then placing it in the boot of the taxi, which bag has been confirmed to contain the drugs which is the subject matter of the charge.

[22] We are of the view that the learned judge was right in finding that the second accused had knowledge of the contents of the bag which he took and placed in the boot of the taxi in the wee-wee hours between 3–5am that day in question. In our view the judge was right in drawing an inference that he had knowledge from the movements and conduct of the second accused as described by him, as well by reason the large quantity of drugs recovered. The judge was right in concluding that the second accused had knowledge of the contents of the plastic bag and in invoking the presumption of trafficking under s 37(da) of the Act.

[23] On the trial judge's appraisal of the defence, we are of the view that the learned judge was also right in not accepting the defence story and in ruling that the second appellant had failed to raise a reasonable doubt in his favour. The presence of Ah Foo was clearly an afterthought and improbable as it was not raised at the first possible instance and not put in cross-examination to the prosecution witnesses. A determination of this issue clearly calls for an assessment of credibility of the second accused which we, in exercise of our appellate jurisdiction, are not inclined to interfere.

[24] To conclude, the appeal is dismissed. The decision of High Court is affirmed.

Appeal dismissed.

Reported by Kohila Nesan